UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. S1 09 Cr. 666 (DLC)

GARY GELMAN,

Defendant.

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July 25, 2014
2:05 p.m.

Before:

HON. DENISE COTE

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BRIAN BLAIS
Assistant United States Attorney

SALVATORE E. STRAZZULLO
Attorney for Defendant

(Case called)

THE DEPUTY CLERK: Is the government ready to proceed?

MR. BLAIS: Yes. Good afternoon, your Honor. Brian Blais for the government.

THE DEPUTY CLERK: For the defendant Gelman, are you ready to proceed?

MR. STRAZZULLO: Yes, your Honor. Good afternoon. Sal Strazzullo on behalf of Mr. Gelman. Good afternoon again, your Honor.

THE COURT: Good afternoon and welcome.

Mr. Strazzullo, have you and your client both read the presentence report?

MR. STRAZZULLO: Yes, your Honor.

THE COURT: Have you discussed it with each other?

MR. STRAZZULLO: We have.

THE COURT: Do you have any objections to it other than what might be contained in your written sentencing submissions?

MR. STRAZZULLO: No objections other than the memorandum I have submitted to the Court, your Honor.

THE COURT: Thank you.

The presentence report will be made part of the record in this case and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report without further application to this Court.

I have received victim impact statements pursuant to a cover letter of July 22 from the U.S. Attorney's Office. I have a sentencing memorandum filed by the government on July 18, and I have a sentencing memorandum by the defendant filed on July 11.

There is a request for a minimum role adjustment under the sentencing guidelines in defense counsel's letter that I believe would be a breach of the plea agreement. The government is construing it simply as an argument in support of a variance under Section 3553(a).

Is that the correct interpretation I should make of it, Mr. Strazzullo?

MR. STRAZZULLO: Yes, your Honor.

THE COURT: Thank you.

I have a proposed restitution order. I assume that this actually should be filed under seal.

Is that right, Mr. Blais?

MR. BLAIS: Your Honor, because it does not have contact info for any of these individuals, I believe that it can be filed without being under seal.

THE COURT: OK. I don't want to file the names in the public record. I am happy to file the redacted copy in the public record, but I think the names should be filed under seal.

MR. BLAIS: We don't object to that. That's fine, your Honor.

THE COURT: Any objection to me executing this restitution order, Mr. Strazzullo?

MR. STRAZZULLO: No, your Honor. In regards to the names in the restitution order, Mr. Gelman has seen it, but doesn't have a copy of the actual document, but he has reviewed it with me, just to inform the Court that it is in my possession and not in his.

THE COURT: Thank you.

I have already executed a preliminary order of forfeiture, and I make that order as well part of this sentencing proceeding.

This is a case in which there was a plea agreement with an offense level of 23 and a criminal history category of I. The probation department arrives at the same calculation. The parties do not object to it. I reviewed the support for that, and I adopt it as my own. If there were litigation over the defendant's role, I would not find a role adjustment to be appropriate here, either a minor or a minimal role adjustment. Therefore, the sentencing guidelines range is 46 to 57 months. The probation department recommends a sentence of 46 months.

Before we get to presentation with respect to sentence by the defendant and the government, I understand that there is a victim who wishes to address the Court, is that right, Mr. Blais?

MR. BLAIS: That is correct, your Honor. John Downer, who is a family member of one of the victims of the offense, Robert Downer, wishes to address the Court pursuant to the crime victims' rights statute.

THE COURT: Thank you.

Is Mr. Downer in the courtroom?

Mr. Downer, do you want to come up to the podium, please, and identify yourself by name, and I would be happy to listen to anything you have to say.

MR. DOWNER: Thank you.

My name is John Downer. I am here on behalf of my father, Robert Downer, who passed away on January 11th of this year. He was born in the town of Montgomery, New York 70 years ago. He was the first of his family to go to college. He earned a regents' scholarship to Union College. He then received a scholarship to the medical school at Tulane University.

During medical school he was diagnosed with type 1 diabetes, which changed his life forever. He knew his life in the future would not be the same now, and he decided to work as much as he could for as long as he could. He worked 70 to 80 hours a week. He took care of anyone at any time, regardless whether or not they could pay for their care or not. His goal was to be a great health-care provider and build financial stability for himself.

My father believed in education. He paid for his cousins', employees' and children's educations. He set up two scholarships to his alma maters. Due to the acts of this criminal, the dreams of future students to further their education has been taken away from them.

This criminal enterprise fed on the sick, elderly, and easily taken advantage of individuals. My father battled diabetes for more than 40 years, received a kidney transplant and fought sepsis. This left him unable to communicate and socialize as he once had. He was homebound and the perfect victim for this criminal enterprise. For years he was encouraged to invest after being mailed false investment statements. He told the people at AR Capital his dream for his money was to educate his grandchildren and to take care of himself as he came more dependent on extra care. After the group of criminals took more than $7 million, he was encouraged to borrow against the house he owned in full. Their goal was not only to bankrupt him, but to leave him homeless.

Mr. Gelman ran and hid for many years. I can only assume living a great life off of the millions of dollars he stole. I do not see any mitigating factors not to sentence him to the longest prison term allowed by law.

Number one, he worked with a group of other criminals to steal from one of the most vulnerable groups of our society, the elderly. Number two, getting his victims bankrupt was not sufficient. He wanted to leave them homeless and unable to do anything that would bring them happiness, like traveling to graduation ceremonies, birthday parties, or to any special family occasion. Number three, he ran when given the chance to admit and try to repay his victims for his crimes, and may have only came back from the Ukraine because it's really bad there now. Number four, Mr. Gelman's list of victims is greater than you will ever know.

Your Honor, I appreciate the forum to speak today and for your consideration to what I have said and to my father's suffering. If you have any questions, I would be glad to answer you.

THE COURT: Thank you, Mr. Downer, and I am very sorry for your family's loss. And, of course, the loss your family suffered is not just the loss of your father through his recent death, but I encompass within that the financial loss that your family has suffered.

I will hear from the government.

MR. BLAIS: Thank you, your Honor.

In his sentencing submission, the defendant has asked for a non-incarceratory sentence. For the reasons that we outlined in our sentencing submission, we believe that that would be entirely inappropriate in this case. Not only because other defendants with equal culpability have received substantial sentences in this case, but because the defendant's actions have had real impact on real individuals.

You have heard from one family here today who suffered substantially as a result of the defendant's actions. And you can see a glimpse of that as well in the victim impact statements that we have received, among the more powerful victim impact statements I have ever read in any case I have ever been associated with.

This is not a circumstance where individuals took a flier and invested $100 on a potential stock investment. The individuals who invested in this case, and you can see from the restitution order, virtually all of them invested at least $10,000 as part of this scheme, many of them, including Mr. Downer, for example, substantially more. And you can see from the victim impact statements that for many of these individuals impacted by this crime that what they invested was not just pocket change or spare change. For many of them it was their entire life savings. There was a specific instance I recall from the victim impact statement of somebody who cashed in their IRA, a retirement fund, in order to be able to invest in this scheme.

This was a brazen fraud that preyed on some of the most vulnerable people in our society. Many of the victim impact statements are from elderly individuals, people in their 60s and 70s and 80s, who not only have lost this money, but are struggling to make ends meet today more than five years after this -- actually, almost ten years after this fraud was completed. The harms in this case were real and impacted real individuals. This was a serious offense that warrants a substantial sentence of incarceration because it had a real impact on a number of victims.

Also, this is the kind of offense that calls for general deterrence, for a message to those who would prey on vulnerable people through these kinds of fraudulent investment schemes, that there is a consequence, that there is a real price to pay for causing harm to innocent and unwitting individuals. This is a case that calls for that kind of message, and I think a substantial sentence is warranted as a result of that.

Now, as part of this sentencing, there are, rightly so, financial consequences to this defendant of having to repay the victims, to the extent he can, through the restitution order, to forfeit the proceeds that he obtained from this event, and that is appropriate and called for in this circumstance where there are real victims and real people who have suffered.

So, in sum, and I don't want to repeat and rehash what we have said in our sentencing submission, this defendant's conduct, which is at the core of the fraud, he was the one who dealt with the investors and got them to part with their money. That's the core essence of the fraud here, that is a real offense and a serious and consequential offense, and it calls for a sentence that is substantial. And we believe a sentence within the guidelines range of 46 to 57 months appropriately accounts for all of the factors set forth in Section 3553(a), including the nature and circumstances and seriousness of this offense, the general and specific deterrent purposes set forth therein, as well as the history and characteristics of this defendant. And as we outlined, and as your Honor is well familiar from the circumstances of this case, there was a substantial period of time where this defendant was a fugitive from justice and delayed the time where the victims in this case could get real recompense, and that is certainly a factor that is well worth considering in fashioning an appropriate sentence in this case.

Thank you.

THE COURT: Mr. Strazzullo.

MR. STRAZZULLO: Good afternoon again, your Honor.

I would like to first start off by stating that there isn't anything that Mr. Blais or the victim's son has said that is not true. These are actual victims. We have never doubted that. We don't object to that.

With respect to Mr. Gelman, as the government has stated in their own words at prior hearings, Mr. Gelman was essentially just a salesperson. In any criminal enterprise, your Honor, as you very well know, there are different levels of culpability, the president, the vice president, going down the line of the structure of any criminal enterprise. Mr. Gelman was basically just a salesperson. Yes, he did wrong, but his level of wrongdoing is different than the president, the vice president, the people that ran the day-to-day affairs of the company.

Now, Mr. Fishman, who was the actual president, received a sentence of 37 months. Now, looking at what the government stated, they said, well, he didn't run the day-to-day affairs. Well, not that many presidents in criminal enterprises run the day-to-day affairs. They have the low-level workers doing the grunt work and the dirty work.

So in regards to his role in the offense, I would ask your Honor to consider that his role was, at the very least, a minimal role, as the government has made an admission in prior hearings.

THE COURT: I am sorry. The government made an admission in prior hearings that Mr. Gelman's role was a minimal role?

MR. STRAZZULLO: Not a minimal role, that he was merely, essentially, a salesperson. I apologize if I misspoke, your Honor.

In regards to who Mr. Gelman is, he has never been in trouble before. Yes, this crime happened, it occurred. I am not doubting that whatsoever and neither is Mr. Gelman.

However, we have to look at Mr. Gelman's upbringing. Number one, mainly, the way he was raised. Not everyone is raised in a traditional family, mom and dad. His mom served time in jail for stealing shoes to feed the family. She served two years in prison. Mr. Gelman's dad was an alcoholic and basically didn't want anything to do with Mr. Gelman. In addition, his stepfather physically abused his mom right in front of Gary while Mr. Gelman was growing up.

He has basically been on his own since he was 16 years old, your Honor. He came here with his paternal grandmother. He has a very, very strong relationship with his son. As you can see, he does have substantial community friends and ties to the community where I believe he could basically do better from this lesson that he has learned, which is a very, very tragic lesson to the victims, to the government, and to the United States in whole.

Currently Mr. Gelman is on home confinement with his mom, living with his mom. He works as a stockboy at a liquor store in the neighborhood. He has complied with all of your Honor's requests regarding home confinement, curfew, etc., etc. He has not had any marks, anything since he has had home confinement.

Your Honor, most importantly, why is Mr. Gelman back? Yes. What is going on in the Ukraine at this moment is not the best place to be, but he has engaged my law firm for over now two years when these things weren't occurring. I just want to make that clear. He could have stayed in the Ukraine, your Honor. He did not have to come back. As a matter of fact, he met with FBI agents there well over two years ago to try to get his passport back so he could travel back. He had a nice life there. His family could visit him any time he wanted. He did not have to spend one single day in jail. He basically had no reason to return other than facing justice, taking responsibility, and taking apparent responsibility for all the actions that took place in this criminal conspiracy. Most of all, to basically mend the ties with his family, especially his son, which he did not have that, your Honor. He did not have what he is trying to give to his son.

Looking at all of this, I would ask your Honor for the most lenient sentence, a sentence in regards to basically imposing a sentence that is sufficient but not greater than necessary to comply under 3553(a), your Honor.

I thank you. Again, on behalf of Mr. Gelman, I apologize to the victims, especially the victim that made the statement today, to the United States government, and to you, yourself, your Honor, and apologize to his family. Mr. Gelman at this time would like to make a statement, whenever you're ready, your Honor.

THE COURT: I just wanted to raise with you, Mr. Strazzullo, there is a statement in your submission that Mr.

Gelman's wife relies upon Mr. Gelman for his support. I understand that she has a relationship now with another man, and she has another child, that she is not living with the defendant, and I just wanted to make sure I understand those facts correctly.

MR. STRAZZULLO: That is correct, your Honor.

THE COURT: So, Mr. Gelman, I will hear anything that you have to say on your behalf.

MR. STRAZZULLO: Thank you.

THE DEFENDANT: Your Honor, I would like to extend my deepest apologies to everyone who were affected by my actions. My initial intentions were never malicious. However, everyone around me has been feeling the wrath of my poor decisions. I want to extend my deepest apologies to the innocent victims who have suffered the financial, emotional, and moral burden on my wrongdoings. I am forever in debt to you for hurting your families and your lives.

I would like apologize to you, your Honor, to the Court and to the government. Also, I would like to say sorry to my family and friends.

As a child growing up, I had no one to point me to the right direction. I realized what I did and came back to pay for my mistakes and poor decisions. I missed five years of my son's life and don't want to miss any more time. I want to be there for him and help him make the right decisions to see him mature and become a good man that I think he can be. Life has taught me many things, but none of which is stronger than the pain I have caused my family, my friends, and the innocent victims. My choices are not who I am. However, they have brought me here, and I ask you to please understand that as a human I made mistakes, and I will always live with the heavy burden in my heart.

Again, I am deeply sorry and take full responsibility for my actions.

THE COURT: Thank you, Mr. Gelman.

Well, this was a blatant, large-scale fraud that had enormous far-reaching consequences for its victims. You were involved for a significant period of time. The deceit and the fraud I don't think can be overstated. I don't find any role adjustment to be appropriate. You were an essential player in this fraud. You communicated directly with the victims. You told lies. Your false statements and misrepresentations caused their losses. You knew what you were doing was wrong. Therefore, I am not, considering all the factors under Section 3553(a), going to vary from a guideline sentence here. I find that individual and general deterrence and appropriate punishment suggests strongly that the sentence outlined in the guidelines are appropriate here.

Please stand.

I impose a term of imprisonment of 46 months, to be followed by a term of supervised release of three years, with the following special conditions:

You shall report to the probation office in the district to which you are released within 72 hours of release from custody.

You shall not commit another federal, state or local crime.

You shall not illegally possess a controlled substance.

You shall submit to the regular drug testing program.

You are prohibited from possessing a firearm or other dangerous weapon.

You shall cooperate in the collection of DNA.

You must pay restitution.

You must comply with the standard conditions of supervised release.

You must participate in a program approved by the probation department for alcohol abuse.

You shall submit to a reasonable search by the probation department.

You must seek and maintain full-time employment.

You are to provide the probation department access to any and all requested financial information.

You must not incur any new credit card charges or open any new credit lines without approval of the probation department.

You shall notify the U.S. Attorney's Office within 30 days of any change of mailing or residence address that occurs while any portion of restitution remains unpaid.

You shall be supervised by the district of your residence.

You shall pay a special assessment of $100.

I decline to impose a fine given the substantial restitution amount that you must pay.

Counsel, is there any legal reason why I cannot impose the sentence I have described as stated?

MR. BLAIS: No, your Honor.

MR. STRAZZULLO: No, your Honor.

THE COURT: I order the sentence I have described on the record to be imposed as stated.

You may be seated, Mr. Gelman.

I believe there are open counts.

MR. BLAIS: Yes, your Honor. The government would move to dismiss open counts, as well as the underlying indictment as to this defendant.

THE COURT: Your application is granted.

Mr. Gelman, I need to advise you of your right to appeal. If you are unable to pay the cost of an appeal, you may apply for leave to appeal in forma pauperis. Any notice of appeal must be filed within 10 days of the judgment of conviction.

You must surrender to the designated institution for service of your sentence by August 29 at 2:00. Failure to appear will subject you to separate punishment and an additional period of incarceration. If there is no designated institution, you must surrender to the U.S. marshals in this courthouse by that date and time.

Counsel, is there anything else?

MR. STRAZZULLO: Your Honor, just in regards to your recommendation for a facility, as he is going to do 46 months, can it be somewhere in the vicinity of where his family is in Brooklyn so he can retain and work on his family ties and connection.

THE COURT: I will recommend to the Bureau of Prisons a designation to a facility as close as possible to New York City.

Anything else?

MR. STRAZZULLO: Thank you, your Honor.

THE COURT: Counsel, is there anything else?

MR. BLAIS: Nothing from the government, your Honor.

MR. STRAZZULLO: No, your Honor.

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